

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

\* \* \*

UNITED STATES OF AMERICA,

Case No. 2:13-CR-18 JCM (GWF)

**Plaintiff(s).**

## ORDER

V.

LEON BENZER, et al.,

Defendant(s).

Presently before the court is petitioner Edith Gillespie's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255. (ECF No. 835).

Also before the court is petitioner's motion for leave to file supplemental points and authorities. (ECF No. 836).

## I. Facts

On January 15, 2013, the government filed an indictment charging the petitioner with one count of conspiracy in violation of 18 U.S.C. § 1349 and fourteen counts of wire fraud in violation of 18 U.S.C. § 1343. (ECF No. 1). In March 2015, the court held a fifteen-day jury trial. *See* (ECF No. 537). The jury returned a guilty verdict for one count of conspiracy and one count of wire fraud. *Id.*

On June 17, 2015, the court sentenced petitioner to sixty (60) months of custody per count to run concurrently followed by three (3) years of supervised release to run concurrently. (ECF No. 740). On August 14, 2015, the court entered judgment. *Id.* Petitioner appealed and, on March 23, 2018, the Ninth Circuit affirmed the judgment. (ECF No. 823).

1      **II.      Legal Standard**

2      Federal prisoners “may move . . . to vacate, set aside or correct [their] sentence” if the court  
3      imposed the sentence “in violation of the Constitution or laws of the United States . . .” 28 U.S.C.  
4      § 2255(a). Relief pursuant to § 2255 should be granted only where “a fundamental defect” caused  
5      “a complete miscarriage of justice.” *Davis v. United States*, 417 U.S. 333, 345 (1974); *see also*  
6      *Hill v. United States*, 368 U.S. 424, 428 (1962).

7      Limitations on § 2255 motions are based on the fact that the movant “already has had a fair  
8      opportunity to present his federal claims to a federal forum,” whether or not he took advantage of  
9      the opportunity. *United States v. Frady*, 456 U.S. 152, 164 (1982). Section 2255 “is not designed  
10     to provide criminal defendants multiple opportunities to challenge their sentence.” *United States*  
11     *v. Johnson*, 988 F.2d 941, 945 (9th Cir. 1993).

12      **III.      Discussion**

13      As a preliminary matter, the court will grant petitioner’s motion for leave to file  
14      supplemental points and authorities as they provide legal arguments and authorities in support of  
15      petitioner’s § 2255 motion.

16      Petitioner argues that the court should vacate her sentence based on two grounds: (1)  
17      ineffective assistance of trial counsel and (2) ineffective assistance of appeal counsel. (ECF No.  
18      835).

19      *a. Procedural default*

20      When a defendant fails to raise a legal argument on direct appeal, the “procedural default”  
21      rule applies to bar collateral review under § 2255. *Massaro v. United States*, 538 U.S. 500, 504  
22      (2003). The two noted exceptions to this rule are when a defendant can show both cause and  
23      prejudice, *id.*, or “actual innocence.” *United States v. Ratigan*, 351 F.3d 957, 962 (9th Cir. 2003).

24      To demonstrate cause, a defendant must show “that some objective factor external to the  
25      defense impeded [his] efforts to raise the [barred] claim. . . . Objective factors that constitute cause  
26      include interference by officials that makes compliance with the State’s procedural rule  
27      impracticable, and a showing that the factual or legal basis for a claim was not reasonably available  
28      to counsel.” *McCleskey v. Zant*, 499 U.S. 467, 493-94 (1991) (internal quotations omitted). To

1 demonstrate prejudice, a defendant must show “a reasonable probability that his conviction or  
2 sentence would have been different.” *United States v. Lopez*, 577 F.3d 1053, 1060 (9th Cir. 2009)  
3 (quoting *Stickler v. Green*, 527 U.S. 263, 296 (1999)). If defendant cannot demonstrate cause and  
4 prejudice, the defendant must prove “actual innocence,” meaning “that it is more likely than not  
5 that no reasonable juror would have found petitioner guilty beyond a reasonable doubt.” *Schlup*  
6 *v. Delo*, 513 U.S. 298, 327 (1995).

7 Ineffective assistance of appellate counsel can constitute the cause required to establish  
8 procedural default. *Murray v. Carrier*, 477 U.S. 478, 488-92 (1986). However, “appellate  
9 counsel’s failure to raise issues on direct appeal does not constitute ineffective assistance when  
10 appeal would not have provided grounds for reversal.” *Wildman v. Johnson*, 261 F.3d 832, 840  
11 (9th Cir. 2001). Appellate counsel has “no constitutional duty to raise every non frivolous issue  
12 requested by a petitioner.” *Jones v. Barnes*, 463 U.S. 745, 751-54 (1983). “[W]eeding out weaker  
13 issues . . . is widely recognized as one of the hallmarks of effective appellate assistance.” *Miller*  
14 *v. Keeney*, 882 F.2d 1428, 1434 (9th Cir. 1989).

15 Here, appellate counsel raised two claims of error, as pertaining to petitioner, on appeal.  
16 Focusing on these claims was a reasonable tactical decision. *See id.* The additional claims that  
17 petitioner argues her appellate counsel should have made<sup>1</sup> were frivolous and would have detracted  
18 from the already-weak claims on appeal. Therefore, petitioner has not established cause and  
19 prejudice to excuse her procedural default. Further, petitioner’s motion does not point to any  
20 evidence suggesting that she has a viable claim of actual innocence. Accordingly, all of  
21 petitioner’s claims that she did not raise at the appellate level (petitioner’s first grounds in support  
22 of her § 2255 motion) are barred. *See Massaro*, 538 U.S. at 504

23       b. *Ineffective assistance of appellate counsel*

24 To prevail on a claim of ineffective assistance of counsel, a movant must show deficient  
25 performance and prejudice. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984).

26 “First, the defendant must show that counsel’s performance was deficient.” *Id.* at 687.  
27 “Judicial scrutiny of counsel’s performance must be highly deferential.” *Id.* at 689. “A fair

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28       <sup>1</sup> The court discusses these claims in more detail in discussion section (b).

1 assessment of attorney performance requires that every effort be made to eliminate the distorting  
2 effects of hindsight . . .” *Id.* at 689. “[A] court must indulge a strong presumption that counsel’s  
3 conduct falls within the wide range of reasonable professional assistance; that is, the defendant  
4 must overcome the presumption that, under the circumstances, the challenged action might be  
5 considered sound trial strategy.” *Id.* at 689. To establish deficient performance, the petitioner  
6 “must show that counsel’s representation fell below an objective standard of reasonableness.” *Id.*  
7 at 688.

8 “Second, the defendant must show that the deficient performance prejudiced the defense.  
9 This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair  
10 trial, a trial whose result is reliable.” *Id.* at 687. “The defendant must show that there is a  
11 reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding  
12 would have been different. A reasonable probability is a probability sufficient to undermine the  
13 confidence in the outcome.” *Id.* at 694.

14 Petitioner alleges that she received ineffective assistance of counsel because her appellate  
15 counsel failed to challenge the prosecutor’s alleged acts of vouching. (ECF Nos. 835, 836).  
16 Petitioner specifically alleges that her appellate counsel should have challenged the government’s  
17 closing statement, in which the prosecutor stated that (1) the prosecutors, FBI agents, members  
18 with the Las Vegas Metropolitan Police Department, and the trial judge were monitoring the  
19 truthfulness of the prosecution’s witnesses, and (2) the trial judge had the power to penalize the  
20 prosecution’s witness. (ECF No. 836).

21 Vouching consists of “either placing the prestige of the government behind the witnesses  
22 through personal assurances of their veracity or suggesting that information not presented to the  
23 jury supports the witnesses’ testimony.” *United States v. Molina*, 934 F.2d 1440, 1445 (9th Cir.  
24 1991); *see also United States. v. Wright*, 625 F.3d 583, 610 (9th Cir. 2010).

25 Having reviewed the record, the court finds no support for petitioner’s characterization of  
26 the government’s closing statement. The government did not provide any personal assurances  
27 regarding the veracity of the witnesses. *See* (ECF No. 593). The government also did not refer to  
28 information not presented to the jury in support of the witnesses’ testimony. *See id.* Rather, the

1 statements at issue merely emphasized the procedural safeguards of the trial process. Thus, the  
2 statements were not improper as a matter of law.

3 In light of the foregoing, petitioner's appellate counsel did not engage in deficient or  
4 prejudicial representation by refusing to challenge the government's closing statement.  
5 Accordingly, because petitioner has failed to show that her sentence is unconstitutional, the court  
6 will deny petitioner's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255.

7 *c. Certificate of appealability*

8 The controlling statute in determining whether to issue a certificate of appealability is 28  
9 U.S.C. § 2253, which provides as follows:

10  
11 (a) In a habeas corpus proceeding or a proceeding under section 2255 before a  
12 district judge, the final order shall be subject to review, on appeal, by the court of  
appeals for the circuit in which the proceeding is held.

13  
14 (b) There shall be no right of appeal from a final order in a proceeding to test the  
15 validity of a warrant to remove to another district or place for commitment or trial  
16 a person charged with a criminal offense against the United States, or to test the  
validity of such person's detention pending removal proceedings.

17 (c)

18 (1) Unless a circuit justice or judge issues a certificate of appealability, an  
19 appeal may not be taken to the court of appeals from—

20 (A) the final order in a habeas corpus proceeding in which the  
21 detention complained of arises out of process issued by a State court;  
or

22 (B) the final order in a proceeding under section 2255.

23 (2) A certificate of appealability may issue under paragraph (1) only if the  
24 applicant has made a substantial showing of the denial of a constitutional  
right.

25 (3) The certificate of appealability under paragraph (1) shall indicate which  
26 specific issue or issues satisfy the showing required by paragraph (2).

27 28 U.S.C. § 2253.

Under § 2253, the court may issue a certificate of appealability only when a movant makes  
a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). To make a

1 substantial showing, the movant must establish that “reasonable jurists could debate whether (or,  
2 for that matter, agree that) the petition should have been resolved in a different manner or that the  
3 issues presented were ‘adequate to deserve encouragement to proceed further.’” *Slack v.*  
4 *McDaniel*, 529 U.S. 473, 484 (2000) (citation omitted).

5 The court holds that petitioner has not made the required substantial showing of the denial  
6 of a constitutional right to justify the issuance of a certificate of appealability. Reasonable jurists  
7 would not find the court’s determination that movant is not entitled to relief under § 2255  
8 debatable, wrong, or deserving of encouragement to proceed further. *See id.* Accordingly, the  
9 court declines to issue a certificate of appealability.

10 **IV. Conclusion**

11 Accordingly,

12 IT IS HEREBY ORDERED, ADJUDGED, and DECREED that petitioner’s motion to  
13 vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 (ECF No. 835) be, and the same  
14 hereby is, DENIED.

15 IT IS FURTHER ORDERED that petitioner’s motion for leave to file supplemental points  
16 and authorities (ECF No. 836) be, and the same hereby is, GRANTED.

17 The clerk is directed to enter a separate civil judgment denying petitioner’s § 2255 motion  
18 in the matter of *Gillespie v. United States*, case number 2:18-cv-00801-JCM.

19 DATED February 5, 2019.

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UNITED STATES DISTRICT JUDGE  
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